90-62

No.

Supreme Court, U.S.
FILED
JUL 2 1990
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CLERK

In The

Supreme Court of the United States

October Term, 1989

JOSEPH MANZO and PATRICK MANZO, *et al.*,

Petitioners,

vs.

MICHAEL MANZO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED

I. Whether the solicitation of a bribe by a judge in a case pending before him constitutes a denial of due process which requires vacating his prior orders in the case.

LIST OF PARTIES

The parties are Patrick Manzo, Joseph Manzo, Michael Manzo, Rose Manzo, Manzo Excavating Company, a New Jersey Corporation, Manzo Contracting Co., Inc., a New Jersey Corporation, Madison Bituminous Products, Inc., a New Jersey Corporation, Marlboro Bar and Liquors, Inc., a New Jersey Corporation, Claire Passarella, Old Bridge Land Development Co., Inc., a New Jersey Corporation, Northeastern Land Development, a New Jersey Corporation, Bituminous Materials, Inc., a New Jersey Corporation. All of the corporations are closely held corporations owned by the Manzo brothers. Rose Manzo is Michael Manzo's wife and a minority shareholder in Manzo Excavating Co. Claire Passarella is Michael Manzo's daughter and a shareholder of Marlboro Bar & Liquors, Inc.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

There are no parent companies or subsidiaries.

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I. The state court has decided an important question of federal law which has not been, but should be, settled by this Court and which may be construed as in conflict with the decision of this Court in *Aetna v. Lavoie* 4

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No.

In The

Supreme Court of the United States

October Term, 1989

JOSEPH MANZO and PATRICK MANZO, *et al.*,

Petitioners,

vs.

MICHAEL MANZO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Joseph Manzo and Patrick Manzo petition for a writ of certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey as confirmed by the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinion of the trial court (1a) is not reported.

The opinions of the Superior Court of New Jersey, Appellate Division and of the Supreme Court of New Jersey denying a petition for certification dismissing the appeal (63a) are not recorded.

STATEMENT OF JURISDICTION

The Appellate Division of the Superior Court of New Jersey rendered its decision on November 27, 1989. The Supreme Court of New Jersey denied a petition for certification and dismissal of the appeal on February 26, 1990. A petition for rehearing was denied on May 5, 1990 (65a). Jurisdiction is conferred on this Court by Article III of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

Amendment XIV of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

Joseph Manzo and Patrick Manzo filed a complaint against their brother, Michael Manzo seeking reformation of stock ownership and dissolution of several closely held corporations. An answer, counter-claim and third party complaint was filed

and the matter was settled on July 9, 1976 by entry of a stipulation of settlement and order embodying the terms of the settlement stipulation. The settlement had been reached on July 8, 1976 but is was too late in the day to place the settlement on the record. The parties returned the following day to place the settlement on the record. The settlement would require continued involvement by the court regarding the implementation and interpretation of the settlement. The trial judge was Thomas L. Yaccarino and when the parties returned on July 9, he requested as a condition of the Court's approval of the settlement, that his decisions would be final and subject to appeal (42a). The parties agreed.

Thereafter, the trial court entered orders interpreting and implementing the settlement with which Joseph Manzo and Patrick Manzo disagreed. Appeals were taken from several of Judge Yaccarino's orders, the first of which resulted in a reversal and remand because of Judge Yaccarino's failure to provide Joseph and Patrick Manzo an opportunity to be heard. Other appeals taken by Joseph and Patrick affirmed Judge Yaccarino's decisions upholding the non-appealability of his orders.

In February or March of 1981, with the permission of the parties' attorneys, Judge Yaccarino began to meet privately with the parties. At one meeting with Joseph and Patrick Manzo, the judge solicited a bribe in the nature of a purchase of a home in Sea Girt, New Jersey at an unrealistically low price. *In Re Yaccarino*, 101 N.J. 342, 373, 375, 391 (1985); *In Re Yaccarino*, 117 N.J. 175 (1989). Judge Yaccarino recused himself from the case on March 9, 1982.

Joseph and Patrick Manzo filed a motion with the trial court to vacate Judge Yaccarino's orders prior to 1981 which was argued on November 26, 1986 (14a). The motion sought to set aside the settlement agreement and vacate Judge Yaccarino's orders

because of judicial misconduct. It is the denial of this relief that is the subject of this petition.

REASONS FOR GRANTING THE WRIT

I.

THE STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND WHICH MAY BE CONSTRUED AS IN CONFLICT WITH THE DECISION OF THIS COURT IN *AETNA V. LAVOIE*.

Corruption is the most insidious denial of justice. It is dificult to imagine anything more damaging to the judicial system than the perception that it is subject to corrupt practices such as bribery. The denial of due process inherent in Judge Yaccarino's solicitation of a bribe was first raised by the plaintiffs on a motion to vacate Judge Yaccarino's orders and set aside the settlement. The trial court denied the motion in an opinion premised largely upon inconvenience and the waste of judical resources.

When this decision was reviewed by the Appellate Division, its application of the principles enunciated by this Court in *Aetna v. Lavoie*, 475 U.S. 813, 89 L. Ed. 2d 823 (1986) was both narrow and incorrect. The basic premise of due process in *Aetna* is "a fair hearing before a fair tribunal." The Appellate Division contrued *Aetna* as merely holding that only those decisions in which the judge has a direct personal interest are affected by judicial impropriety and require the remedy of vacating the decision. The rationale seems to be that since the judge solicited a bribe in the nature of an unrealistically low price for the property in Sea Girt and since he made no decisions regarding that property after he solicited the bribe, thre was no basis under *Aetna* to vacate his prior decisions. This rationale fails to appreciate the dynamics

of a soliciation for a bribe. Clearly, the bribe could not be successfully solicited without prior demonstration or indication of adverse consequences.

It is impossible to determine with precision when Judge Yaccarino decided to solicit a bribe. The circumstance of his requiring the parties to waive their right of appeal on July 9, 1976 appears suspicious in hindsight. It is obvious and logical that the decisions of Judge Yaccarino before he solicited the bribe were the decisions necessarily affected. It seems clear that the taint of this corruption infected all of the proceedings before Judge Yaccarino.

Considerations of justice and the high regard for due process of law mandate that Judge Yaccarino's decisions in the case before the solicitation of the bribe be vacated.

CONCLUSION

For the reasons argued, petitioners respectfully request a writ of certiorari be issued to review the decision of the Appellate Division of the Superior Court of New Jersey as affirmed by the Supreme Court of New Jersey.

Respectfully submitted,

LEE W. SHELLY
Attorney for Petitioners

APPENDIX A — OPINION DECIDED NOVEMBER 27, 1989

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-995-88T1

PATRICK MANZO and JOSEPH MANZO,
Plaintiffs-Appellants,

v.

MICHAEL MANZO,
Defendant-Counterclaimant,
Respondent

and

ROSE MANZO, MANZO EXCAVATING CO., a New Jersey Corporation, MANZO CONTRACTING CO., INC., a New Jersey Corporation, MADISON BITUMINOUS PRODUCTS, INC., a New Jersey Corporation; MARLBORO BAR AND LIQUORS, INC., a New Jersey Corporation; and CLARE (MANZO) PASSARELLA,
Defendants-Counterclaimants,

and

MICHAEL MANZO, MANZO CONTRACTING CO., INC., a New Jersey Corporation; and MANZO EXCAVATING CO., INC., a New Jersey Corporation,
Third Party Plaintiff,

v.

Appendix A

OLD BRIDGE LAND DEVELOPMENT CO., INC., a New Jersey Corporation; NORTHEASTERN LAND DEVELOPMENT, a New Jersey Corporation; and BITUMINOUS MATERIALS, INC., a New Jersey Corporation,
Third Party Defendants.

Argued October 4, 1989 - Decided November 27, 1989

Before Judges King, Shebell and Keefe.

On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County.

Lee W. Shelly argued the cause for the appellant Joseph Manzo (Mr. Shelly and Richard E. Beck, on the brief).

Richard E. Beck argued the cause for the appellant Patrick Manzo (Mr. Beck and Lee W. Shelly, on the brief).

John N. Post argued the cause for the respondent Michael Manzo (Irwin & Post, attorneys; Mr. Post, of counsel; John A. Stone and M. Lorene Van de Castle, on the brief).

PER CURIAM

Plaintiffs Patrick and Joseph Manzo appeal from two orders entered in the Chancery Division, General Equity Part. The first order, dated December 10, 1986, denied plaintiffs' motion to set

aside a settlement agreement entered into on July 9, 1976.[1] The second order, dated June 27, 1988, was a final order implementing the aforementioned settlement. The primary issue raised on appeal is whether the 1976 settlement agreement and all orders of Judge Yaccarino, implementing and interpreting that agreement from its inception until his recusal in March, 1982, should be set aside. If the answer to that question is in the affirmative, plaintiffs contend that certain issues previously decided by the Appellate Division in two prior unreported decisions must be re-examined. Further, plaintiffs argue that, assuming the settlement agreement is not set aside but the orders of Judge Yaccarino are, certain issues such as interest, mining rights and good will must be re-examined by the special master, appointed in December, 1986, in light of his reliance upon orders entered by Judge Yaccarino in making recommendations to the court in December, 1987. For reasons to be stated herein we affirm the judgments under review.

In early 1975, plaintiffs instituted an action against defendants Michael Manzo, Rose Manzo, Manzo Excavating Co., Inc., Manzo Contracting Co., Inc., Madison Bituminous Products, Inc., Marlboro Bar & Liquors, Inc., and Clare Passarella seeking various forms of relief including dissolution of several closely held corporations and the distribution of corporate assets. On July 9, 1976 the parties arrived at a settlement agreement embodied in a document called "Settlement Stipulation And Order Embodying Term Of The Settlement Stipulation" (Settlement Stipulation) which provided for the division, through a selection process, of listed assets which were the subject matter of the suit. The Settlement Stipulation anticipated that a number of matters would require further interpretation and implementation and

---

1. Plaintiffs applied for but were denied leave to appeal from that interlocutory order when it was entered.

provided that the trial court would make "the final determination" as to them.

Apparently the Settlement Stipulation had been drafted on July 8, 1976 and tentatively agreed to by the parties while they were in the courthouse on that day. However, the agreement occurred too late in the day to be placed on the record. In view of the late hour, arrangements were made for the parties to return to court on the afternoon of July 9, 1986 for that purpose. Several additional matters, which had been overlooked on July 8, were added by consent of the parties on July 9th in open court. In addition, the trial judge suggested that all disputes resolved by him pursuant to the Settlement Stipulation should be final and not subject to appeal. The judge's suggestion was endorsed by all the parties. Those additional matters agreed upon on July 9, 1986 in open court were ultimately incorporated in the Settlement Stipulation by the entry of a *nunc pro tunc* order dated July 27, 1977. That order provided in part pertinent to this appeal:

> All determinations of the court concerning enforcement and interpretation of this Settlement Stipulation shall be final and not subject to appeal.

Judge Yaccarino, in his role as arbitrator under the Settlement Stipulation, entered several orders during 1977 in connection with issues relating to the implementation of the agreement. Those orders included among other things, a confirmation of the appraisal of certain assets, a determination that Michael Manzo was entitled to possession and control of the Schedule B and C assets, the denial of plaintiffs' application for a plenary hearing regarding the appraisal of plants and equipment and the establishment of specific accounting guidelines. Plaintiffs took separate appeals from several of those orders. The appeals were

consolidated and were the subject of an unreported decision dated March 27, 1978. In that decision we said:

> In anticipation of these disputes, the parties agreed to leave the final determinations as to interpretation or implementation of the Agreement to the trial judge. The finality was underscored by the stipulation that his determinations should be nonappealable.
>
> Such agreements have been approved by our highest court. *Harmino v. Shay*, 101 *N.J. Eq.* 273 (E. & A. 1927). This is in accordance with the weight of authority. See 4 *C.J.S.*, Appeal and Error, § 210 (1957), and cases collected therein.
>
> Thus, we hold that the parties are bound by their Agreement to be governed by the decision of the court. This obligation, however, is co-extensive with the court's undertaking (and the condition the parties put on the grant) — upon notice and an opportunity to be heard.

In view of our finding that plaintiffs had not been afforded an opportunity to be heard on the appraisals, the confirmation of those appraisals was reversed, and the matter was remanded for an appropriate hearing.

In 1978, plaintiffs again appealed various orders entered by the trial judge in his capacity as arbitrator under the Settlement Stipulation. One of the appealed orders denied plaintiffs' motion to set aside the settlement. On January 29, 1980, again in an unpublished opinion, we said:

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> We emphasize that plaintiff's challenge to the trial court's jurisdiction to hear and consider these matters was previously raised and rejected in the prior consolidated appeals. *Manzo v. Manzo, supra.* Our decision there upholding the validity of the settlement agreement, and the finality and non-appealability of the trial court's determinations pertaining to the interpretation and implementation of the agreement have decided these questions, and is binding upon the parties. This decision is the 'law of the case' and settled these questions for all subsequent stages of this action. *See State v. Hale*, 127 *N.J. Super.* 407, 410-411 (App. Div. 1974).

After the last Appellate Division decision, a number of issues remained open. They were: the formation of a tax plan, the valuation of certain inventory and accounts receivable and the valuation of a house located in Sea Girt. As part of the implementation of the agreement, plaintiffs selected the house in Sea Girt, which initially had been appraised in 1977. At some undefined point in time, it was agreed by the parties and their attorneys that the trial judge could meet *ex parte* with the individual litigants without the attorneys being present. *Matter of Yaccarino*, 101 *N.J.* 342, 374 (1985). Sometime in February or March 1981, an *ex parte* meeting was scheduled with plaintiffs in Judge Yaccarino's chambers. *Id.* at 375. At this time, the subject of the Sea Girt property came up and the judge expressed an interest in acquiring it. Subsequent to that meeting, Joseph Manzo decided to record conversations with the judge for the alleged purpose of protecting himself. The Supreme Court found that his purpose was otherwise. It said:

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> Despite his assertion that his purpose was to protect himself, Joseph Manzo's real purpose in recording the conversations was to obtain documented evidence that he would use to force respondent [Judge Yaccarino] to disqualify himself from hearing the *Manzo* case. [*Id.* at 378.]

During the course of the conversations, Joseph Manzo and the judge discussed the sale of the house at an artificially low price. *Id.* at 377. In February, 1982, Joseph Manzo revealed the existence of the tape recordings. *Id.* at 380. This revelation ultimately led to the recusal order issued by Judge Yaccarino on his own motion dated March 9, 1982.

In May, 1982, plaintiffs filed a motion "for relief to litigant" in which plaintiffs sought eight forms of relief. One item of relief requested was an order "setting aside the Settlement Stipulation and order dated July 9, 1976 and requiring that the parties to this action negotiate a new agreement . . . ." On May 13, 1982, apparently in connection with the motion, Patrick Manzo filed a certification which said that to avoid "impending tax disaster, the stipulation of settlement must be set aside . . . ." The certification did not say that a reason for setting aside the Settlement Stipulation was the judge's conduct which was by that time well known to both plaintiffs and the general public. That motion resulted in an order executed by Judge McGann, who succeeded Judge Yaccarino, reflecting plaintiffs' request to set aside the Settlement Stipulation was voluntarily withdrawn.

The records submitted to us for review on this appeal reveal that no further matters were brought before Judge McGann by either party until December, 1986 when plaintiffs moved to vacate the Settlement Stipulation and all rulings regarding that settlement

entered by Judge Yaccarino. The motion was denied and leave to appeal from that order was also denied.

On December 15, 1986, Judge McGann, with appropriate prior approval pursuant to *R.* 4:41-1, appointed Irwin Kimmelman, Esq. as special master to conduct hearings and make recommendations toward the resolution of the legal and factual issues remaining in the implementation of the Settlement Stipulation. Thereafter, the special master held formal hearings on nine separate dates in July and August, 1987 and rendered a report of his findings to the court on December 16, 1987. The report was later supplemented.

After reviewing the record made before the special master, Judge McGann issued a lengthy bench opinion on June 27, 1988 and executed a final order implementing that settlement. This appeal followed.

The issues presented by plaintiffs' appeal are best understood in the context of the Supreme Court's decision in *Matter of Yaccarino, supra*,[2] which found three distinct ethical violations resulting from Judge Yaccarino's involvement in the subject litigation: 1) *ex parte* meetings and communications with the litigants; 2) self-dealing with respect to the Sea Girt property; and 3) suppressing and concealing evidence of his self-dealing. *Yaccarino*, 101 *N.J.* at 391-392. With respect to the first offense, the court noted that the judge's "conduct was encouraged and agreed to by all parties and their attorneys," and, because of that

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2. On October 13, 1989 the Supreme Court decided *In the Matter of Thomas L. Yaccarino*, ___ *N.J.* ___ (1989), concerning the disbarment of Yaccarino. Nothing in that opinion changes our interpretation of or reliance upon *Matter of Yaccarino*, 101 *N.J.* 342 (1985).

circumstance, determined that "additional discipline for this enfraction would not be warranted." *Id.* at 391 (citing *Matter of Alvino*, 100 *N.J.* 92 (1985)). In *Alvino*, the Court said that "[n]ot every failure of a judge to conform to the standards of the Code amounts to judicial misconduct or merits formal discipline." *Alvino*, 100 *N.J.* at 96.

The record before us does not reveal when it was that the parties and their attorneys agreed to permit *ex parte* meetings with Judge Yaccarino. However, it is apparent to us that the judge's participation in such meetings directly led to his "most serious and unredeeming" transgression, i.e. self-dealing in the Sea Girt property. *Yaccarino*, 101 *N.J.* at 391. Other than that instance, plaintiffs have failed to show other examples of how Judge Yaccarino's involvement in *ex parte* communications may have influenced his orders or intimidated plaintiffs into taking positions against their pecuniary interest in carrying out the settlement plan.

Plaintiffs contend that because Judge Yaccarino breached judicial ethics in connection with their settlement that breach is sufficient, standing along, to set aside all his decisions in this matter. We find no legal support for such a broad contention. *Aetna Life Ins. Co. v. Lavoie*, 475 *U.S.* 813, 106 *S. Ct.* 1580 (1986), upon which plaintiffs rely, requires only that the decision made by the recused judge from which he derived a benefit be vacated as a remedy in favor of the party who was prejudiced by the judge's misconduct. 475 *U.S.* at 828-29, 106 *S. Ct.* at 1588-89. *Rite Aid Corp. v. Board of Pharmacy, State of New Jersey*, 421 *F. Supp.* 1161 (D.N.J. 1976), appeal dismissed 97 *S. Ct.* 1594, 430 *U.S.* 551 (1977), stands for the same proposition. There is a dearth of law in New Jersey on this subject, but the extant case law appears to require the movant for recusal to prove

that actual prejudice was suffered in order to justify the vacation of prior judicial actions in the matter. *Mackler v. Board of Ed. of Camden*, 16 *N.J.* 362 (1954); *State v. Muraski*, 6 *N.J. Super.* 36 (App. Div. 1949); *Clawans v. Waugh*, 10 *N.J. Super.* 605 (Co. Dist. Ct. 1950).

In their appellate brief, plaintiffs make the following argument concerning the issue of prejudice:

> Throughout the case plaintiffs had a pervasive feeling because of Judge Yaccarino's avowed disregard for Joseph Manzo that plaintiffs could not get a fair adjudication on the issues and that he favored Michael. In light of the apparent ease of corruptibility of Judge Yaccarino plaintiffs preceived [sic] that Michael might have somehow improperly influenced Judge Yaccarino. Plaintiffs do not have a shred of proof that this may have been the case other than the fact that a majority of their motions for relief were denied and the judge's eagerness to purchase the Sea Girt house while this litigation was still pending.

A similar argument was made before Judge McGann but it was unsupported by certifications signed by either plaintiff.

The only record source for the argument claiming prejudice was a passage from a hearing conducted in open court on October 25, 1978 involving Joseph Manzo and his newly retained attorney. Joseph Manzo, through his attorney, took the position that a certain piece of property, the Morgan farm, should be considered as an asset for distribution under the Settlement Stipulation. Both Judge Yaccarino and the attorney who represented Michael Manzo

at the time of the 1976 settlement specifically recalled that the dispute concerning the Morgan farm had been resolved in the settlement by giving plaintiffs $250,000.00 as set forth in the Settlement Stipulation. Clearly, Judge Yaccarino's remarks were intemperate. However, neither Judge McGann nor we are satisfied that this one instance substantiates plaintiffs' claim of bias or prejudice.

More importantly, although plaintiffs claim to have had the "pervasive feeling" of prejudice "throughout" the case, they never asserted that as a grounds for setting aside the settlement in either of their two prior appeals, nor did they raise the argument when they moved to set aside the settlement in May 1982, subsequent to Judge Yaccarino's recusal. Clearly, "partiality or corruption," of an arbitrator goes to the heart of the parties' due process rights and constitutes a well recognized ground for vacating an arbitration award. *N.J.S.A.* 2A:24-8. We conclude that plaintiffs' failure to make the arguments before Judge Yaccarino's recusal or immediately thereafter, coupled with their current failure to point to specific instances of prejudice, evidence a lack of substance in their position on this point.

Quite aside from plaintiffs' lack of evidence in advancing the issue of prejudice occurring "throughout" the proceedings, long established precedent favors waiver of such an objection if not timely made. *N.J.S.A.* 2A:15-50; *Curtis v. Joyce*, 90 *N.J.L.* 47 (1917), aff'd 91 *N.J.L.* 685 (E. & A. 1918); *In re Hague*, 103 *N.J. Eq.* 505 (1928); *536 Broad St. Corp. v. Valco Mortg. Co., Inc.*, 135 *N.J. Eq.* 581 (1944), aff'd 136 *N.J. Eq.* 513 (1945). Thus, we decline to reverse any order entered by Judge Yaccarino on the grounds that he harbored a general prejudice toward plaintiffs.

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Plaintiffs' argument that Judge Yaccarino's misconduct stemming from self-dealing in the Sea Girt property directly impacts on the validity of his orders also lacks factual support. The record reveals that the judge first expressed an interest in the Sea Girt property in February or March, 1981. His pursuit of that interest thereafter, and until his recusal one year later, constituted misconduct and grounds for disqualification. *Yaccarino,* 101 *N.J.* at 392. We accept plaintiffs' contention that Judge Yaccarino's avowed interest in the property subjected him to immediate disqualification. Thus, any decision he made in this case after February, 1981, may have been tainted by his self-interest and must be vacated if plaintiffs claim they were prejudiced by the decision. In point of fact, however, plaintiffs point to no such decisions occurring after February, 1981.[3]

Thus, in the absence of proof of general prejudice or partiality against plaintiffs and in the absence of any decisions by Judge Yaccarino during the period of his personal self interest resulting in prejudice to the plaintiffs, there are no legal or factual grounds to set aside any of the orders entered by him pursuant to the Settlement Stipulation.

Finally, plaintiffs contend that the 1976 Settlement Stipulation should be set aside. The argument has no merit either in fact or

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3. Our independent review of the record reveals only one such order. In July, 1981 Judge Yaccarino ordered plaintiffs to pay back bonuses that they took subsequent to the September 30, 1977 cut-off date. However, in doing so he was enforcing an order entered several years earlier. The record reflects that the judge had enforced that order earlier against defendant. It appears, therefore, that both plaintiffs and defendant were treated equally. Thus, there is no reason to vacate that order and the special master's reliance on it in his report is not erroneous. *See* Report of Special Master 25.

law. There is no proof in the record that the settlement negotiations resulting in the Settlement Stipulation were a product of *ex parte* communications between Judge Yaccarino and the litigants. Moreover, the settlement took place well before any overt act of prejudice was alleged to have occurred and certainly well before any indication of self-dealing by Judge Yaccarino. As we have observed on two prior occasions, the Settlement Stipulation was solely the product of the parties' free will.

In view of our determination that neither the Settlement Stipulation nor any order entered by Judge Yaccarino pursuant thereto must be vacated, it stands to reason that Judge McGann's final order implementing the settlement was entered in his capacity as the arbitrator under the Settlement Stipulation. As such, his decision is final and non-appealable unless the decision was entered without notice and without affording the parties an opportunity to be heard. However, in view of the extensive hearings conducted by the special master, the opportunity given to the parties to file exceptions to his report, and their opportunity to be heard in open court prior to the entry of Judge McGann's decision, it is clear that the due process aspects of the settlement document were faithfully followed.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

s/ R. Emile Cox
Clerk

APPENDIX B — TRANSCRIPT OF PROCEEDINGS ON MOTION DATED NOVEMBER 21, 1986

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY

DOCKET NO. C-726-75

PATRICK MANZO and JOSEPH MANZO,
Plaintiffs,

vs.

MICHAEL MANZO, et al,
Defendant, Counterclaimant,

and

MICHAEL MANZO, et al,
Third-Party Plaintiffs,

vs.

OLD BRIDGE LAND DEVELOPMENT COMPANY, INC., et al,
Third-Party Defendants.

Transcript of Proceedings

MOTION

Monmouth County Courthouse
Freehold, New Jersey
November 21, 1986

Appendix B

BEFORE:

HONORABLE PATRICK J. MC GANN, JR., J.S.C.

ANN MARIE LOFFREDO, C.S.R.
Official Court Reporter
Monmouth County Courthouse
Freehold, N.J. 07728-1255

APPEARANCES:

RICHARD E. BECK, ESQUIRE,
Attorney for Patrick Manzo.

FRED S. DUBOWSKY, ESQUIRE,
Attorney for Joseph Manzo.

JOHN N. POST, ESQUIRE,
Attorney for Michael Manzo.

[3] (November 21, 1986)

THE COURT: All right. Manzo against Manzo.

I believe that the first motion we ought to address, since it is so fundamental, is Mr. Dubowsky's motion on behalf of Joseph Manzo to set aside an act that was done in 1976.

MR. DUBOWSKY: Essentially, I have less of an argument because I rely on the decision of New Jersey Supreme Court regarding the facts and I rely on the United States Supreme Court decision with respect to the application of law. I have yet to find a case in any jurisdiction in all the treatises that I've been looking

at that states anything different if a judge acts contrary to a rule, contrary to a statute in it, and the language of the rule and the statute is a mandatory sense, then he's not acting. He has no jurisdiction. The due process clause, I think, is clearly implicated with respect to the conflict of interest question that the Supreme Court addressed regarding Judge [4] Yaccarino the period of '81 and thereafter. I believe that cases — the Supreme Court did not decide that the *ex parte* hearings and the brain dysfunction question specifically in that case.

However, it seems that the New Jersey Supreme Court accepted the defense argument of brain dysfunction. We have the rules 1:12 — whatever it is that says disability and then gives you a paragraph which says "for reasons other than that," again it can be considered void. We have a mandatory rule in the sense that you couldn't waive the situation. You could have made it known to both parties on the record, and it would't availed anything.

THE COURT: But could I just ask this question: You know, assume all of the bad consequences of what you argue, how does that go back and affect the settlement, which was really something the parties created and the judge just added his signature back in 1976?

MR. DUBOWSKY: Factually, I don't believe that's the case. I believe that that settlement was the product of *ex parte* [5] dealings by the Court with the parties. At least —

THE COURT: Where do you substantiate that allegation?

MR. DUBOWSKY: I don't have it in the New Jersey Supreme Court opinion. They began their inquiry in '79. I only

know it from — and I don't know where — I've spoken to Mr. Post during the course of the case.

THE COURT: I should think the certification should be helpful to me in that regard.

MR. DUBOWSKY: That's correct. I had indicated in my brief it was never opposed. I just thought it was sort of — I'm the latecomer, so what is known by the other parties when I indicated those facts in my brief and it was never questioned. I just assumed it was unnecessary.

THE COURT: I question it. I have to.

MR. DUBOWSKY: I don't have it backed by certification. It's been my understanding that it was such a common — common knowledge, I mean in the sense that in talking to the attorneys during the case that it was not necessary. I'm remiss in not certifying.

[6] THE COURT: I wasn't here either. It's ancient history to me, too. I'm heading the history books.

MR. DUBOWSKY: I don't have the certification. I understood that to be so and I can supply it.

THE COURT: What would that certification say if it could be supplied based upon the hearsay that's been given to you?

Mr. DUBOWSKY: If that certification would indicate, number one, that during the course of the negotiations concerning settlement Judge Yaccarino meet with, for example, my client and others as well with respect to working the settlement.

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Particularly the question concerning the right to be the sole judge/arbitrator, what have you. That was one of the conditions of the Court in putting through the settlement. That's what I was told was the facts in the situation. That this idea of him being the sole arbitrator was one that he discussed with other judges who had been involved in that situation and the Court was the one who said: Look, this settlement, one of the conditions is I [7] want to make sure that there's no appealing. We don't go up and down and what have you. And that was one of his conditions.

THE COURT: He could have dropped dead the next day and that would have done away with any thought that he was in control. The man upstairs was in control.

MR. DUBOWSKY: You're absolutely right.

Mr. BECK: Judge, perhaps I can shed some light on this. I've been in the case longer.

THE COURT: If Mr. Dubowsky defers to you.

MR. DUBOWSKY: By all means.

MR. BECK: There is a transcript of a hearing that goes back to the time when the parties sat in this courtroom and got on the stand, accepted the stipulation of settlement. There was some discussion, I believe the attorneys Frank Crahay for the plaintiffs and Mr. Post for the defendant. There was a review of the entire stipulation of the settlement on the record and discussion of the long negotiation in which the judge had [8] participated in late into the evening hours of the day where I believe we could produce

that transcript for you which would shed light on those early negotiations.

THE COURT: I think you ought to read into the record the provision that Mr. Dubowsky is pointing to. It's Provision 21, which says in the event there shall be any dispute between the parties as to the interpretation of this stipulation or the mechanics of the implementation thereof, the court shall determine each and every such dispute. Giving due notice to the respective parties and opportunity to then be heard. In this respect the Court shall retain jurisdiction for the purpose of making such determinations and enforcing the determinations of this stipulation and expeditiously implementing its final conclusion.

That's what you're talking about, that paragraph?

MR. BECK: I think — .

THE COURT: It says the Court. So the Court can be anybody. The chief justice can switch anybody and anybody becomes the Court.

[9] MR. BECK: Yes.

MR. DUBOSKY: A further —

THE COURT: Now, if you continue the argument.

MR. DUBOWSKY: Further, I understand there were various points during the time that the transcript was working where the Court would say let's stop and there were certain remarks made that my client tells me were very prejudicial to his case.

The one that he mentions is that some reference by Yaccarino that the older brother in an Italian family is the one who really should be in charge of things and these other people shouldn't be fighting with his authority.

Now, that is an *ex parte* or you wouldn't find that in the transcript.

THE COURT: The kid brother in any family, Irish, Italian, resents remarks like that.

MR. DUBOWSKY: So — as I indicated, I didn't go into certification. I just thought it was accepted as well known with respect to the way the matter went.

[10] THE COURT: If there is a transcript, as Mr. Beck says there is, show me the transcript.

MR. DUBOWSKY: The only thing that touches upon the settlement, of course, is the question of the *ex parte* hearings. I don't know at what point you can transfer back to — I mean, the settlement was not something that the parties made up without the Court's directing.

THE COURT: That happens many times.

MR. DUBOWSKY: Of course.

THE COURT: Nothing evil about that.

MR. DUBOWSKY: No. But what happens is you get — you're now trying to kaleidoscope back based on the events that occurred.

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You have two appellate decisions that said we can't decide it because of that clause and then of course when you threw the recusal problem on that I don't know what happens, and I don't know if we go back to the Appellate Division and ask them to decide it again. I just don't really know, I know that there's for sure, absolutely, without a question, a large measure of what [11] Judge Yaccarino did can't really be the law in this case.

Now, once you start with that and start to figure what's avoidable, when did it start when did he get sick; when did he have that thought process; who decided this based on what he decided already becomes a jumble of — I mean, as bad as it is, once you start with something is void, there is a problem here.

There was some question concerning these proceedings, and when you start scraping away in what you're going to set aside and what you're not and what you're going to follow and why decide that; one didn't rely on this; did he rely?

I mean, it's a hopeless situation and I frankly believe two things. I think a year ago when I first became involved here I don't think we have a choice. I mean, when you say avoid, it means that we all may say this is a wonderful decision, we like it. My original thought was let's void the settlement and settle it again, because at least it gets rid of the questions and the taints and the [12] problems as to its enforceability even where everybody's concerned. But that didn't work out.

I just don't know how else to approach it. And here's the interesting thing: I don't see any difference work-wise or argument-wise if we set it aside and if we don't. I'm faced with an acting problem on both sides because we own the stock in our corporations. I mean, I have derivative actions flowing from claims

that some of the assets were secreted and weren't specially — the assets he's talking about some farms here and there. They're not mentioned in the settlement agreement, and the corporation certainly is a derivative action against that. I have a settlement agreement saying that the parties are supposed to work together and they're still owning these stock corporations. So even if you continue with the settlement, I still want to know what you did for the past 10 years. I still want to know what is your mortgage. You weren't supposed to mortgage. You weren't supposed to do this. I have the same acting commitment here if you settle it. [13] At least I don't have taints and void and this period is wrong, that period is right, that would so confuse the question we'd never get done.

I really believe in my original brief, we're situated with a partition sale. This could be very easy. We have rules about how to handle it. You gather up everything that's jointly owned in any manner, shape or form and you settle it, and if you have a question we have a standing master. We could have an acting accounting, a custodial receiver and we have a solution.

THE COURT: But all those solutions were available back in 1976 and they were competent lawyers who were thinking about it, and there was a judge who otherwise deemed it to be an entirely competent judge injecting himself into it, in your words, but there's no reason for believing that any settlement arrived at today would be arrived at any better than that settlement. It's all 20-20 hindsight, but it's 20-20 hindsight 10 years later.

MR. DUBOWSKY: I tell you, it's a very [14] unusual settlement that produces what we had here.

THE COURT: Don't say unusual. It's their deal.

MR. DUBOWSKI: As far as their deal is concerned, I have a claim with respect to the tax consequences flowing from that deal that has been litigated now for five or six years. And the fact is the settlement really doesn't set up the the tax plan. Their deal may not have been one — I mean, I have to think that the attorneys who wrote the settlement have to believe, if they looked at what they've done, the settlemment really didn't operate to achieve the goals of the clients.

I also believe that neither of the clients contemplated the results that occurred and neither of the clients who entered into this agreement got what they bargained for, and I think that they didn't get it in large measure because the agreement really wasn't written in such a way as to know what you got.

And then you get that thrown in on the court problem with respect to the situation. [15] I don't know what — I wouldn't begin to tell you how to proceed with regard to the completion of it. And if it was their deal it wasn't what they bargained for because they didn't contemplate this result.

THE COURT: Oh, well, they didn't contemplate the result is no reason for setting aside an agreement because that happens many times. People say, "Oh, gee, if I only known the consequences I never would have done that." But life can't go that way, nor can ordinarily judicial proceedings go that way.

All right. I understand what you're saying. Number one, you're saying it would be better if we could all forget about it and go back to square one. It would be better at least from the standpoint of your client, which is why you're bringing the motion.

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You're also saying that what they agreed to originally was so infected by whatever it was that Judge Yaccarino was doing as a judge back in 1976 that for basic reason it ought to be voided.

Let me ask Mr. Beck where do you stand [16] on the application.

MR. BECK: Judge, I would support Mr. Dubowsky's application.

THE COURT: Okay.

MR. BECK: He did the spade work by virtue of the share volume of items we have on today's calendar.

THE COURT: You've done your spade work through the years, too.

MR. BECK: The problem we have with the entire-implementation of the agreement — and I think we've made known to the Court it's from the standpoint of plaintiffs — if they take all their assets out of these corporations they're going to take the major tax bate. We also feel that the selection process, as it ended up, leaving Michael with bits and pieces of various corporations is going to result in the withdrawal assets for virtually all the corporations and everybody is going to be paying taxes out of the assets as opposed to keeping sets of assets with corporations and corporations with the individual brothers.

So the way we ended up with the selection [17] process, Michael certainly has a right to select first under the agreement or stock with this enormous mish-mosh of selections.

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We also find now that we can't take our selections because a lot of them had judgments.

THE COURT: I understand the problems there. There's no sense in emphasizing those. But your legal position, though, is similar to that of Mr. Dubowsky.

MR. BECK: Well there is also a perception on our side. I don't like to say it because I've had friendships in the past with the people we're talking about, but there is a perception on our side. We were the ones making 99 percent of the motions in this case before Judge Yaccarino and about 97 percent of them were denied and a lot of the matters we presented to the judge we were reluctant to bring before him because we knew that he was going to deny our application. He was extremely antagonizing towards us. It was a perception that we couldn't get our arguments out. Couldn't explain them in open court. There was a time [18] when the judge had open heart surgery. You came on the bench and we tried to put as much issues as we could before you as quickly before he came back.

THE COURT: I was the new kid on the block.

MR. BECK: And educated you as to what was going on — so forth. The point is that I think Fred made the point in his brief if he did this to us, in other words, if he's willing to take a house from us he might have done something with Mike. We can't put any figure on it, but that was a perception.

So I think we've fared rather badly in the entire case, and I think we ought to go back to square one and start over.

THE COURT: All right. Mr. Post.

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MR. POST: Your Honor, I find the last comment by Mr. Beck to be outrageous. To suggest that my client, when there has never been one single allegation, much less evidence, to indicate that my client has been involved in the kinds of activities that Patrick Manzo was involved in is outrageous and it's completely without support in the record of [19] this case, which fills up I believe more than two drawers in the Court's chambers. And I suggest that it should not even be given any consideration by the Court whatsoever.

MR. BECK: Judge, just to clear it, I'm not making any accusations against Mr. Michael Manzo or Mr. Post. Obviously, I'm just saying that we had this perception that things were going unfairly and there was apparently some smoke there by virtue of what happened with Joseph Manzo, but I'm not making any accusations.

MR. POST: Your Honor, to try to look at the history of this case and focus and then see in light of the history of this case the place that the allegations that are currently being made by Patrick Manzo deserves — I think would be worthwhile as I mentioned before. The Court has literally thousands of pages of certifications filed in this case that have been filed with the Court and are going back to 1976.

The case started in 1975. When Merritt Lane was sitting in Chancery Court. [20] When Judge Lane became the assignment judge, Yaccarino took over the case. Yaccarino settled the case in the exchange that Mr. Beck was referring to and Mr. Dubowsky. There is a transcript which contains comments by Judge Yaccarino as to what happened or the evening that he settled the case.

It had been a hotly-contested case. The case was settled late

in the evening and the provision with respect to the role of the Court was to play in implementing the settlement was not placed on record or inserted in the settlement until the next morning.

Judge Yaccarino explained, subsequently on the record, that the reason he suggested and indeed insisted that that non-appealability provision go inserted in the transcript after talking with Judge Lane and advised by Judge Lane that there was precedence in this State for that kind of provision and given the nature of the parties in this case that if there was — were not to be such a provision, the settlement would never be implemented, because every time one of the litigants disliked a decision by Judge [21] Yaccarino there would be an appeal, and it would go on forever.

Now, with respect to the suggestion as being — that's being made by Mr. Dubowsky that that exchange in somehow, in some way, shape or form constituted a basis for concluding that the settlement should be void is simply preposterous.

I might suggest, Your Honor, that what we really have here is an expression by both Patrick and Joseph have dissatisfaction with the settlement.

Now, there's nothing new about that. The first application to vacate this settlement was made in September of 1977. That application went to the Appellate Division. Judge Yaccarino denied the application. It went to the Appellate Division, and the Appellate Division upheld the denial and the non-appealability in the settlement provision.

Now, I would venture to say, Your Honor, that since that original application to vacate the settlement there have been

probably been additional three or four including the applications before the Court [22] today. So that what we have periodically is this case unfolds and as the settlement is implemented is periodic attempts by Joseph and Patrick to again get out from under the terms of settlement which they don't like. And that's really what's going on here and to suggest that there's anything in that dissatisfaction that they have been experiencing, going back to 1977, which serves as base for voiding the settlement is simply preposterous as I suggested before.

THE COURT: There's no question you're right that Patrick and Joseph have tried to set aside the settlement on a number of occasions and there is another occasion. But it's on a slightly different basis and that's really what we have to address and the basis for this application.

MR. POST: And I think — Your Honor asked Mr. Dubowsky a question as to what Mr. Dubowsky could identify in the history of the case that should suggest that we should go all the way back to 1976 for purposes of vacating the settlement.

I submit to the Court that the answer [23] given by Mr. Dubowsky indeed was nothing but hearsay is certainly unsupported by any certification in the 10-year history of this litigation, suggests very clearly that there's nothing coming down to 1981 that would suggest that there should be a vacation of the settlement what might be an issue based on the logic of Mr. Dubowsky's argument and based on what happened is what occurred between the early spring of 1981 and the time Judge Yaccarino ultimately recused himself from the case.

Mr. Dubowsky suggested that he doesn't — has not seen a case in which the court held that a judge who had engaged in

conduct which violated the judicial rules, violated the statute that we have in New Jersey with respect to when judges should disqualify themselves, would permit or would uphold or permit to remain in effect a decision made by a judge who had not disqualified himself when he should have.

There is such a case. The case is *State vs. Connolly,* Your Honor, and it's an Appellate Division decision. It's reported [24] at 120 *New Jersey Super.* 511.

Now, the facts of that case are a bit different from the facts in this case; but I think the principle holds. What happened in the *Connolly* case, Your Honor, was that Essex County judge was sitting on criminal matters, sat on the criminal case after his son had been sworn in as an assistant county prosecutor two weeks before the case started and that's a clear violation of the county government judicial conduct and also of the statute which prohibits those circumstances under which a court should disqualify himself. And the argument made on appeal after Mr. Connolly was convicted was because the judge did not disqualify himself, therefore, the jury verdict of guilty and the sentence imposed on Mr. Connolly by the judge who disqualified himself should be void and the Appellate Division said, no, that's not the result.

The conclusion that the Appellate Division reached was — number one, I should point out that there had been no objection by the defendant at the time the criminal [25] trial was in process, that did not come up until motion for new trial — and the appellate, "In the absence of an objection or a motion for disqualification, the question remains whether his failure to disqualify himself calls for a reversal."

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Holding, "While here the rule calls for action by the trial judge on his own motion, where he, omits to act, such omission in the absence of an objection or a motion to disqualify should not result in a reversal absent a showing that defendant was thereby prejudiced."

All I'm suggesting, Your Honor, is that the law is or is not that failure on the part of a judge to disqualify himself automatically voids action in which that judge participated after he should have disqualified himself, which is really the nub of Mr. Dubowsky's argument. Because if we look at what happened during or after August 5th of 1981, when Judge Yaccarino subsequently recused himself, it is very clear that. what is happening here in terms of an intent to use the unfortunate circumstances of [26] Judge Yaccarino's removal from the bench is simply one more effort on the part of Joseph and Patrick to get out from under the settlement.

And I submit to the Court that if we think about it, it's really an absurd and a preposterous position that they're taking because they have consistently since this Court — since Your Honor because the Chancery judge in Monmouth County — appeared in this court, asked this Court to enforce the terms of settlement which they're now seeking to have voided. They have obtained the benefits of that settlement. In one instance my client was required, pursuant to the terms of settlement, to pay to Joseph and Patrick Manzo $396,000. And that's gone on for five years, Your Honor. And they now come to court and say: Judge, put it all aside. Void it because it is something that we knew about.

Indeed, Joseph Manzo was directly and subsequently involved back in 1981. And I submit, Your Honor, that the position itself displays a contempt to the judicial process which this Court should

not count in this [27] instance. The time that this Court has spent, the resources that this Court has devoted, and the attorneys and parties have devoted for the last five years is now to be chucked aside. Even though they were fully aware of what had been going on and were indeed separately involved in it right from the beginning.

It was interesting, Your Honor, to see the reply that Mr. Dubowsky made to the argument that I've just outlined. We made it in our papers and what Mr. Dubowsky's reply was. His reply was: Judge, our client was waiting to see what the outcome of the Supreme Court decision with respect to Judge Yaccarino's removal was.

And I submit to Your Honor that that is simply no response at all. The Court is well aware that Joseph Manzo was very well represented before Mr. Dubowsky appeared on the scene. The Court knows the extensive proceedings that went on in this case. This is all after Judge Yaccarino recused himself at the time Mr. Orloff was representing Joseph Manzo. There was never any question, Your [28] Honor, about the existence of the facts Judge Yaccarino had recused himself. There was plenty of newspaper publicity about why he had recused himself. He had been suspended from the bench as a result of all those circumstances, and to come forward and suggest to this Court today that: Judge, I was waiting. I didn't make the motion presently pending before this court. I was waiting for the outcome of the Supreme Court proceedings with respect to Judge Yaccarino's removal is simply not credible. It's simply, Your Honor, it is one more exercise in the expedient and duplicity which I suggest has marked conduct of Joseph Manzo in this case.

I might also suggest, Your Honor, that when the question

of the appointment of a special master arose and we began to get close to the time when Your Honor was going to do it, I wrote the Court a letter with a copy to counsel and insisted that the issue which is presently before the Court on the question of whether the settlement should be voided, should be raised and adjudicated before the special master was appointed and [29] before we went one step further in this case. Precisely because of the concerns that I have just expressed about the tendency that exists to sit back, figure, well, I've got one more arrow in the quiver and if things don't go the way I want them to go then I'll fire off that arrow. That's really what happened today, and it submit to that Court for those reasons and the reasons set forth in our brief that the application should be denied.

THE COURT: Briefly.

MR. DUBOWSKY: Very briefly.

State vs. Connolly is just one of those cases where some cases they are voidable, some cases they're void.

He's dealing with a situation where the Court treated as voidable.

I didn't finish answering the Court's question with regard to why the things that happened in 1976 are infected by what later subsequently was decided concerning Judge Yaccarino.

THE COURT: I thought you and Mr. Beck combined had done that.

[30] MR. DUBOWSKY: It was stipulated by counsel's arguments.

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THE COURT: Briefly.

MR. DUBOWSKI: Yes, sir.

Number one, as already indicated the *ex parte* hearings apparently were implicated not only by the Supreme Court decision but were in effect at the time of the settlement was being put through and, number two, *Aetna*, all the cases that we're talking about void once there is nome action by the Court that would render the proceedings void. None of the cases take this microscopic, it happened this way and compare this to that. It's a broad language, *Aetna*, and all other cases you did this on such and such a day. These proceedings are void, remand.

Now, I agree I can't find words which say that this was done at a certain time and that was done — no cases make that analysis. The inference being it of course by their not making analysis and factually you can see there is a time discrepancy between that action and what was done.

I think once something happens in a [31] proceeding that a court was handling that's it for the proceeding in toto. That's the inference I get from *Aetna*.

The next, third, and last argument: The question is when you start taking specific dates, like the conflict question and the brain dysfunction question, you don't know when to start and how far back to go. I mean, obviviously, if the conversation is in the spring the thought processes might have been February or maybe there was another discussion with someone else in January, and the key problem of cost then by not knowing when these things had their genesis, nobody knows or has confidence about the proceeding, which is what this is all about.

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The Court and the rules they don't care about the parties, especially. They're fighting for the judicial system and the integrity and the confidence.

Aetna talks —

THE COURT: Whose confidence?

MR. DUBOWSKY: Confidence of the public.

THE COURT: The public. Okay. All [32] right.

MR. DUBOWSKY: The public knows what —

THE COURT: Not the litigants?

MR. DUBOWSKY: I don't think the cases care — they care about it but the principal problem of course what the Court is trying to do and why they void things maybe under these circumstances may sound unfair to Mr. Post because there's all this work being done. The litigants in their effort and time isn't the big problem. The problem is if you don't have a court system that the people and the public believe in, then you don't have anything. And that's what these cases are talking about.

THE COURT: All right.

One of the reasons that a litigant changes counsel from time to time is the belief that perhaps a fresh look at the situation will cause new arguments to be raised which would be favorable to the litigant. And you know it's not lawyer shopping but there is a certain reality underlying that proposition.

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Mr. Dubowsky, as he says, is recently [33] in the case; and he has raised this issue, which is not one that can be backhanded by the Court. There is substance to the issue.

The void action of a judge who did something improperly. But in that context the argument is that what was done back in 1976 necessarily had to be infected by something that may have happened in '80 or '81 whenever it did and that, therefore, what the parties put together in 1976 with the aid of the Court is a void act.

So what we're trying to void is not a judicial decision but what we're trying to void is an agreed settlement.

The case of the brothers Manzo, Joseph and Patrick against Michael, began in 1975 and as far as the litigation was concerned it was settled in 1976. And the pleading file up to that point was maybe an inch thick and the case was settled.

Ever since then as a settled case Mr. Post pointed out in the County Clerk's Office there are about two drawers full of mostly certifications, back and forth motions and certifications. Very few orders that have [34] entered. And I've been through that whole file. And it's amazing that with all of the paper that's been flying around there have been very few definitive orders entered.

Whatever Judge Yaccarino did after 1976 was not in the context of litigation. It was in the context of people coming back to court to get guidance in connection with the settlements that they themselves had entered. So that it's not *State against Connolly*, where a judge in his judicial position deciding something for the litigants is being questioned. It's in a non-judicial — the parties have used the term arbitrator sense — that the claim is

made that something probably happened that wasn't right, looking at it in retrospect because of what did happen in 1981.

I have said it to counsel before. I don't know whether I've said it on the record or talking to them in chambers; but if one draws back and looks at this case from the standpoint of the public — and I emerge to look at it from the standpoint as to how the public views litigation — the public would [35] think that their money has been wasted because if they're told that people settle a case and that there are two drawers full of papers indicating the many many times that these litigants have been back before the Court to settle their private little disputes, their nagging reservations about the agreement that they originally entered, if the public said why is a judge spending his time with these people who settled those problems in 1976, how can we justify it in the courtroom in the hours of the judge and the salary he gets and all the court — how can we justify that from the public standpoint for a private vendetta. It would be hard to justify.

So if you were to look at it from the public standpoint and say: Well, public, we've spent hundreds of hours on a case, there have been thousands upon thousands of dollars spent for lawyers, judges have agonized over many, many motions, it's okay, we're going to wipe that all out and we'll let the brothers Manzo continue their vendetta on a new basis.

If I were to say that to the public, [36] they'd say, Judge, you ought to be fired. And they'd be right.

You know, it's not the Court's problem. It's their problem and I have said to counsel, and I'm sure they've conveyed it to their clients, that if they want to come to a new settlement agreement and come back to court and say we've resettled our

case, would you put the new settlement on the record, I'd tolerate that; but then there would have to be some sort of never-come-back again type of clause. Go to another higher authority. Go to another arbitrator, you can pick, but don't waste the Superior Court of New Jersey's time with your fights. We're here. We got a lot of troubles with a lot of people and there's been an inordinate amount of judicial time taken with the brothers Manzo, and it's as simple as that.

To suggest that we should go back now and wipe out what's happened since 1976, wipe out their settlement agreement, is madness; and I have no part with madness.

So I will deny the application to set aside that settlement agreement. It wasn't [37] a judicial decision that's asked to be set aside. It was their agreement, and I won't have any part of that. Nor will I attempt to piecemeal in retrospect individual decisions that may have been made by the few orders that are in the file by Judge Yaccarino sometime in the past. You know, back in 1976, I use the expression it's not judicial. He was the new kid on the block just as I became the new kid on the block. 1976, as Mr. Post points out, Judge Lane was the judge sitting in the Chancery Division, and he was the one that handled the litigation, and he was moved to the assignment position and Judge Yaccarino was moved to Chancery's judicial post.

What he saw sitting there was a case, Manzo against Manzo, and did what a judge would do if it can be settled, a complicated case, if people can settle it, settle it. The reason you settle the complicated case like that is the reason I make: Courts don't have time to figure out who owns the various farms, what the interests are, the corporate interests are in the various farms. If you have to, I suppose you do that. But courts [38] don't want to do that.

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These people could have picked an arbitrator from the beginning to straighten out their problems, but they came to the Superior Court, and having come to the Superior Court they settled it. That's their problem. It's their problem from the beginning, and courts can only help families out up to a point.

So I won't set it apart and I won't set it aside, nor will I try to piecemeal and say this is a good order and not infected. That was a bad order must have been infected. Whatever is there by way of order I've already indicated not too many orders, whatever's there stands.

Now, the matter is going to go, and I suggested it to counsel a year ago and got permission from the Supreme Court a year ago to appoint a special master for them. The special master there's a threat of argument that I see that the special master may be changing the settlement agreement that's also a nonsense argument. The special master is appointed by the Court. He reports to the Court, and whatever is done and recommended [39] by the special master becomes court action only when the imprimatur of the Court is or is not put upon it. Don't anybody get the suggestion that by appointment of special master there's another basis for upsetting the settlement agreement. Nonsense. Don't do it.

So we are going to appoint the special master former Attorney General Kimmelman, having been contacted. All the lawyers, no secrets here, he has agreed to act as special master and all of the problems can be presented to him.

Now, there's also the motion to list the problems for him. My thought after reading the moving papers was that it could take the list of Mr. Post and the list of Mr. Beck and put them together and say to the special master, here's what you start with,

and if they want to raise any other questions before him, good luck.

MR. DUBOWSKY: Thank you, Judge.

MR. POST: Your Honor, we had also asked in our papers that the — if a party raises an issue for the special master which [40] has already been disposed of in the course of this settlement, that would the order appointing the special master provide that the special master have the power to make finding that the party has raised issue that had already been decided and to recommend to the Court that that party bear the cost raising that problem?

THE COURT: The special master can do that.

Listen, he's been a Chancery judge himself. So he knows what it is all about. If somebody says: We would like you to hear this, special master, and the argument is — that's already been heard and decided — he hears the arguments and says, yes, that's already been heard and decided. I'm not going to do that and/or he says let's open and he'll decide it and he has a perfect right to do that and put that in his report to the Court.

So now as far as who gets charged counsel fees with regard to individual items, if they argue nonsense they ought to be stuck with counsel they're arguing nonsense, but it's his basic decision not mine; but he'll have [41] the whole ball of wax including the two drawers, the files and everything else he can look through. And the size of the pleadings is a rather simple analysis but I keep saying darn few orders have ever been entered.

Now, the order is an order of denial of Mr. Dubowsky's motion and then we have to structure the order, which will indicate

to the special master what his assignment will be, what he is expected to do for the Court. I would ask this last — ask Mr. Post to take a stab at that order, include the items as I say, that Mr. Beck lists. He says there are more issues, include them all. And then let it go through counsel under the five-day rule and come to me and in the meanwhile I will be on the telephone, and I'll be talking to Mr. Kimmelman as well, and I'll have the value of his input, and if I think there's additional language needed in the order I'll put in the additional language in. Okay?

MR. DUBOWSKY: Thank you, Your Honor. I don't want to create a problem. There's an order — let's assume there are four orders in the case. I don't know.

[42] THE COURT: There aren't many.

MR. DUBOWSKY: Now, one problem has been raised that the order says your motion is denied. On whatever somebody wants and I understand that if you now start looking at the transcripts and colloquy you're not too sure that's what it is because it may have only been denied for a moment, or maybe it is going to be changed, or maybe he hasn't ruled on that.

THE COURT: He can read the transcripts like I can. None of us knows history except from the books and he'll read the transcripts and arguments can be made to him, and he can decide them. But it's on your time and your client's time and his meter and not the Superior Court of New Jersey sitting here listening to things all over again.

MR. DUBOWSKY: Again, the transcripts — are the transcripts considered the result of the case or the orders the results of the court case?

Appendix B

THE COURT: It's all up to him.

Mr. DUBOWSKY: Okay. Fine.

THE COURT: You can argue all those [43] niceties, the order says this, but it really didn't mean that.

Again it's his time and his meter and not my courtroom and I think that's conservation of judicial energy, of which there's darn little left in this case, especially.

MR. DUBOWSKY: Thank you.

MR. BECK: Thank you, Judge.

MR. POST: Thank You, Your Honor.

(Whereupon, the matter concludes.)

APPENDIX C — TRANSCRIPT OF PROCEEDINGS DATED JULY 9, 1976

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY

Docket No. C-726-75

PATRICK MANZO, et. al.,
Plaintiffs,

vs.

MICHAEL MANZO, et. al.,
Defendants-Counterclaimants,

and

MICHAEL MANZO, et. al.,
Third-Party Plaintiffs,

vs.

OLD BRIDGE LAND DEVELOPMENT CO., INC., etc., et. al.,
Third-Party Defendants.

TRANSCRIPT OF PROCEEDINGS

Freehold, New Jersey
July 9, 1976

DANIEL GREENSPAN, C.S.R.,
Official Court Reporter.

Appendix C

[2] APPEARANCES:

FRANCIS X. JOURNICK, ESQ. (Wilentz, Goldman & Spitzer), for Plaintiffs and Third-Party Defendants.

JOHN N. POST, ESQ. (Irwin & Post), for Defendants and Third-Party Plaintiffs.

[3] MR. JOURNICK: Judge, you recall we were here last night until nine or ten o'clock, at which time we marked in evidence a certain item as C-1, which was intended to be a settlement stipulation and order embodying the terms of the settlement in connection with this case. At that time Joseph Manzo was in attendance, as was Michael Manzo. They indicated to you upon interrogation that they were satisfied with the terms of the agreement as your Honor outlined them and as reviewed in that document, and at that time we indicated that we would be back this afternoon with Patrick, Joseph and Michael for the purpose of substituting a newly typed document. It was so late we couldn't do it last night.

At this time in front of me at counsel table is the newly typed document, with some minor changes that have been made by hand this afternoon, mostly typographical. It has been reviewed by Michael Manzo, as I understand, with his counsel, Mr. Post. Also, it has been reviewed by Michael Manzo in the company of Roger Passarella, who has been here throughout the several days of settlement. It has also been [4] reviewed by Joseph Manzo and by Patrick Manzo in my company.

While we are going to submit this settlement order and stipulation for execution by the Court, we simply do not have the time or the mechanics to insert two things, and I would like

to read them into the record, and they will be considered part of the order and stipulation to be signed, and one is an addition to Paragraph 14 of the order and stipulation which would read:

"Such cash distribution shall be implemented only to the extent that the working capital requirements of the corporation or corporations engaged in the contracting business shall not be impaired. If such distribution would result in such impairment, then the differential shall be adjusted with a reasonable payout."

That should be considered in addition to Paragraph 14. That encompasses the idea that once the assets of the corporation, such as cash, receivables, and certificates of deposit are calculated, less liabilities, it is intended that Joseph and Patrick would get the first [5] $250,000 and that Michael would share in the remainder to the tune of 60, then Joseph 25, and 15 percent to Patrick.

It may be, as we discussed last night, that that might result in stripping the particular corporation of operating capital, in which event reasonable operating capital will have to be left in and the balance of the dollars will have to be paid over a reasonable period to either Joseph, Patrick or Michael, as the case may be.

Secondly, with regard to Paragraph 14, the intention of that paragraph, as about to be expressed by me and agreed to by Mr. Post, is that there is to be included in the calculation some reasonable determination of bad debts reserve and contigent liabilities. Obviously, implicit in that is that at some point in time actual experience will prove whether or not these estimates for bad debts and contigent liabilities are accurate or inaccurate. It may result in partial payment over to these people or perhaps they will have to forego some other consideration if the reserves

are too low either for contigent liabilities or bad [6] debts.

Now, with regard to the document, I believe that it has been fully explained to Joseph and Patrick. Joseph has indicated his agreement with it and I understand Michael has, as well, although Mr. Post can speak for him. Patrick has asked for the opportunity to take the stand, which I think is necessary in any event, so that he may indicate his approval. He indicates that he has some questions which he would like to put to the Court.

THE COURT: There was some language the Court wanted.

MR. JOURNICK: Yes, sir. The Court raised the question with regard to a determination by this Court in the enforcement of this agreement with regard to disputes that may occur in the interpretation of the agreement.

It is understood in behalf of Joseph and Patrick that the determination of this Court would be final and not subject to appeal. For example, in the event it should be determined that within the next 30 days one of the parties is making unusual, extraordinary purchases to perk up the assets of a particular corporation [7] that he may be seeking to recapture in the process, obviously, that would have to be brought to your Honor's attention for a decision after the parties would have an opportunity to be heard. Your decision would then be final and not subject to appeal. My clients agree with that process. They feel comfortable with it, as long as they are given the opportunity to be heard.

THE COURT: I want to make a statement. The Court finds that the document should be read as meaningful, that this Court shall act as arbitrator in the resolution of all questions arising under this document or settlement, and that any determination

made by this Court is final and not appealable, because you are asking this Court to approve a settlement, where I may have to participate within the next year or year and a half in working this out to its final conclusion, I would assume one to two years before it is totally completed, and you are giving me a job, and I don't want a job and I don't want to approve a settlement where I am going to be involved and somebody is going to appeal everything I decide. I don't have to [8] go along with it. I can make you try the case, and you can appeal the whole thing, if you want. I am willing to work with the parties. I think I have already evidenced that. I think the parties know this Court has sat ready to serve in the interest of settlement or anything else. This Court will always afford the opportunity to the parties to be heard, and the Court will, before even doing that, get back to where I have always been. These gentlemen are all brothers and at all times they will be encouraged to settle their differences with each other. They are three grown men. They have been out in the world. They ought to be able to resolve their differences. They should understand that this Court will always permit them to resolve their own differences, to sit down and reason together, before the Court would get involved. I have a lot of other cases. I know how important the case is to you, and it is important that it be done right, but I have 165 other cases on the fall calendar, and I have other things to do, so I want it understood, and I would solicit from the parties a statement that in carrying out the terms [9] of this agreement in the future the Court has the authority to be the final arbitrator.

Is that satisfactory to Joseph and Patrick?

MR. JOURNICK: We discussed that it would probably be economically desirable for all of the parties to get a timely result. I would recommend it and they have indicated their agreement at this moment.

MR. POST: Mike, is that agreeable to you?

MICHAEL MANZO: Yes.

THE COURT: Let the record show that all three parties have been asked by counsel and they all confirm, concur and agree that the Court, in carrying out the terms of this agreement, in deciding the meaning of the terms, is in the capacity of an arbitrator, and the decision is not appealable.

So we will call Mr. Patrick Manzo. Incidentally, we did not go through the formality last night of having each witness sworn. We will do that now. We will take Mr. Patrick Manzo first.

May I have a copy of that, in case he asks me questions?

[10] PATRICK MANZO, sworn.

BY MR. JOURNICK:

Q. Mr. Manzo, you are one of the parties in this lawsuit, together with your brother Joseph; is that correct? A. Yes, right.

Q. And involving also your brother Michael and various corporations and parties which the three of you may jointly own in various capacities; is that correct? A. Yes.

Q. And you have been made aware of the various settlement negotiations with regard to this case that have been carried on over the last three or four days; is that correct? A. Yes.

Q. You have not been actually in attendance at all of these

conferences, but you have discussed them both with me and with your brother Joseph; is that correct? A. Yes.

Q. And this afternoon did you have an opportunity to review the proposed settlement stipulation and order as submitted to you by me in the conference room next door? A. Yes, most of it.

Q. Is there anything that you don't understand or which you would like to make inquiry about at this point? A. There is one I would like to make. It is not in [11] there, but it entered my mind that along with all of this--how would you word it?

BY THE COURT:

Q. The best way you can. A. Assuming they are working in Lakewood, they are working on a job, or we are working down here on a job--

Q. What company? A. Old Bridge. Anyhow, if one company is losing money, will that be charged against the whole asset?

Q. Wait a minute. You have to remember this. There is a selection process of assets. What that means, you and Pat--Mike--at one point are going to be required to pick and choose what you want. A. I think you didn't follow me.

Q. Listen to me. You are talking about before you picked them? A. No, I'm not even talking about that. I think you misunderstood.

Q. I probably did. Say it again. A. Well, Mike is operating separately in Lakewood. We are in Old Bridge.

Q. Right. A. If one company is losing money--

Q. Yes. [12] A. We are in Old Bridge, he is in Lakewood. If we lose X number of dollars, does that have any effect on anyone? Is anyone else going to have to suffer the consequences?

Q. Let's assume Old Bridge is losing money. Now, right now you and Pat are running Old Bridge? A. Joe.

Q. You and Joe. Right. Okay. Under this agreement, the brothers are going to have to sit down and sooner or later you are going to have to pick and choose what you want out of this pot. A. What you are saying is everybody has to shoulder the loss.

Q. Will you listen to me? Don't talk. A. All right.

Q. Let's say that you and Joe take over, just for instance, you want Old Bridge, you select Old Bridge; let's say Mike selects Lakewood. If Lakewood loses money after Mike selects it, that is Mike's problem. A. I'm talking about the problem--

Q. They are both going businesses, and any losses or gains stay where they are. You can't guarantee Old Bridge is not going to burn down tomorrow; you can't guarantee that Lakewood is not going to burn down tomorrow; but until it is resolved it will run on profit and loss statements. The quicker the parties get together, the [13] quicker you get it whacked out the quicker you don't have to worry about whether the other guy is losing money in what you didn't take. A. There is one thing I have not been clear on.

Q. What is that? A. That is if one branch is liable for the other.

THE COURT: Does Lakewood belong to Old Bridge?

MR. JOURNICK: No.

MR. POST: No.

THE COURT: There would be reduction in the total assets.

MR. JOURNICK: If there is, there would be a 60-25-15 division of any losses.

THE COURT: Or gains.

BY THE COURT:

Q. Suppose a company makes money? A. Well, there wouldn't be any--what you are saying is if there is loss at either end the other will help recuperate, will have to help recuperate the loss.

Q. You don't take losses of one company and offset them with profit from another. What you are in effect saying is if an asset is losing money, do you all share in the loss? You all share in the loss if anyone loses money.[14] A. That's where I want the explanation.

Q. The fact of the matter is at times one of them gets going pretty steady, at times none of them. It may never come out equal. Some days you make money, some days you don't; right? A. Well, I wouldn't know how to comment on it. I have

an answer in mind, but I wouldn't know how to go about it.

Q. Think about it. A. I would rather not. It gets too complicated.

Q. What is your primary concern? A. If this thing is resolved, is settled, everybody goes their own way. Loss, if there is any, is there anybody else that has to suffer the losses?

Q. No. It is a pot that the three of you are splitting up. A. The pot will not be thrown in and say, "Well, this is what we have in assets," and then you have to--

Q. Let me give you an example. It has been explained, I am certain, that under the selection process if a party wants to pick up, let us say, Lakewood, Lakewood has got to be sold. Has that been explained to you? A. Yes.

Q. Lakewood may be worth to the Manzos, let's say Lakewood is worth to the Manzos a million dollars. Okay. Let us say to Yaccarino, who is down there doing the road [15] work, it is worth $500,000. Let us say I am the only buyer in town. If I buy it for $500,000 and you guys have been carrying it for a million, how much did you lose? A. A half million.

Q. Whom do you think should share that loss? A. Well, that's a different type of loss.

Q. Is any one of these business running in the red? A. I wouldn't know.

Q. It has been represented to this Court that they are all healthy. A. I'm only speaking in the event--

Appendix C

Q. In the event that any business runs at a loss, the loss is a business loss and it reflects in the value of the assets that are to be whacked out. Everybody will share or gain equally according to the proportion. I have nothing to do with the 60-25-15. That is something you fellows worked out. I have nothing to do with that. If it makes money, you make it on the basis of 60-25-15. If you lose money, you lose it on the basis of 60-25-15. It is a representation of either an increase or decrease in your proportionate share. What business is running bad that you are worried about. A. I don't want to get into details. He's got a great big job down there that I think is going to run into the red.

Q. You think he underbid? [16] A. That is my opinion. I could be wrong. What I'm saying, do we have to suffer that loss?

Q. Yes. You suffered all gains from his business. A. No, I didn't suffer any gains. Unfortunately, I can't say that. Twenty years of hard work and about 60 to 80 hours a week.

Q. We are going to take care of that. What I am concerned about is that you understand what you are agreeing to. That is my primary concern. A. That's what I'm afraid of. What you are saying is anybody can go out and run up a big bill and not worry about it, somebody else picks up the difference.

MR. JOURNICK: He's talking about over-purchasing of inventory.

Q. Who is going to do that? You have been a very successful operation until you had this fight. I can't understand. That is what makes me wonder. All this did not come about only through hard work. Somebody had brains. How many guys out there working those hours, they don't come home with anything besides a pay check. Somebody put together a lot of stuff. It works two

ways. I am not suggesting that one can be successful without the other. I am not suggesting that it just takes brains and no brawn. I know you need a combination of both. Now, somebody did something right someplace for three brothers to be whacking [17] out all these assets. It sure wasn't anybody that didn't know what they were doing. This didn't come about because somebody is dumb. If I understand you, you are worried that in the intervening time somebody is going to put somebody in the hole. A. That is what I am afraid of, to be honest with you.

Q. That this might happen. A. Yes.

Q. You didn't worry about that before you were in court. You didn't worry about all these things. A. Oh, I did.

Q. It got better over the years. A. No, no.

Q. You mean things are worse now? A. Right now they are.

Q. They are worse. A. Worse than ever right now.

Q. You mean financially? A. I don't know financially. Through their use of the companies they are fighting one another.

Q. Well, you want me to make those guys stop fighting? A. What I'm saying--

Q. If I could do that, do you think we would be in court? [18] A. The only thing I would like an answer on, I don't want to say afterwards it's all done, then say we lost X number of dollars.

Q. What I am concerned about is your 15 percent. A. I am very dissatisfied with the 15 percent.

Q. I didn't ask you to be satisfied with it. I told them yesterday I was concerned about it, I wanted to meet you. I will take care of it. Don't you worry about it. A. Well, really, your Honor, the only thing I am worried about is how small does this 15 percent shrink to?

Q. Not very small.

MR. JOURNICK: I think he is wondering how fast this can be accomplished. A. Accomplished, and also I just don't want — my whole life is here. I got nothing out of life.

Q. You expect the 15 percent to be a real 15 percent? A. Right.

Q. And I will expect that is what it is going to be, and I will tell you this: This Court will do everything necessary to protect this entire settlement and preserve the integrity of your 15 percent. Okay? A. Okay, your Honor.

Q. Anything else you want to know? [19] A. No. That's the main thing.

Q. Do you understand what I am saying to you? A. I understand.

Q. You want a little reassurance, you don't want an explanation. A. Right.

Q. You are really here to get some reassurance and to tell

the Judge whether or not you understand what is going on? A. Right.

Q. Do you approve of this proposed settlement? A. Yes.

Q. Do you agree to be bound by the terms of the settlement, keeping in mind —A. Yes.

Q. — what has been said? A. Providing that everything is going to work in a fair manner.

Q. Mr. Manzo, did you hear me tell the three parties that I wanted an insertion in this settlement agreement that I would be the final arbitrator and anything I decided would not be appealable to any Court? Did you hear me say that? A. Yes.

Q. Did you hear all parties, including yourself, [20] approve of that? A. Yes.

Q. Who is going to have the final say? A. You are.

Q. Okay. You approve of this settlement? A. Yes.

Q. You accept its terms? A. Yes.

Q. You agree to be bound by its terms? A. Yes.

THE COURT: Thank you, Mr. Manzo. You may step down.

(Witness excused.)

THE COURT: May we have Joseph and Michael sworn and testify?

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JOSEPH MANZO, sworn.

BY THE COURT:

Q. Mr. Manzo, Mr. Journick represented to the Court he has gone over this new agreement with you which was updated from yesterday with some interliniations made by hand? A. Yes, sir.

THE COURT: Incorporated, I assume, are the changes that we proposed last night?

[21] MR. JOURNICK: Yes, your Honor, plus the changes just stated on the record.

Q. You realize there is another condition of the agreement, it is not in here, but it will be incorporated? A. Yes.

Q. Do you understand the nature and extent of this agreement? A. Yes, sir, I do.

Q. And do you agree to be bound by its terms? A. Yes, I do.

Q. Do you consent to that addendum? I know you said it to your lawyer. I want a statement from you that in addition to this there are implementations in here that the Court shall act in the capacity of an arbitrator of all issues arising under this agreement and any decision made by this Court is final and not appealable to any Appellate Court. A. I agree.

Q. You agree to be bound by the terms? A. Yes.

Q. You want to tell your brother, Patrick, we are going to take care of the 15 percent? A. Yes.

Q. I think both brothers should assure him that while this fight raged hot and heavy between two other [22] parties, he will not be overlooked. A. Yes.

THE COURT: That is all.

(Witness excused.)

MICHAEL MANZO, sworn.

BY THE COURT:

Q. Mr. Manzo, Mr. Post has gone over this agreement with you as it has been changed since last night? A. Yes.

Q. And there have been some oral additions made to this agreement, particularly those recited by Mr. Journick, and the statement by the Court that there shall be an insertion in this settlement embodying the terms of this agreement whereby the Court shall act in the capacity of an arbitrator, and final arbitrator, in the resolution of all issues under this settlement and the determination of the Court shall be final and not appealable. You indicated to Mr. Post that was agreeable to you. I would like you to state on the record whether or not that is so. A. Yes, that is so.

Q. You have had an opportunity to listen on these many occasions you have been in court. Is there anything you don't understand about this agreement that you want this Court to explain to you? [23] A. No, there isn't.

Q. Does it meet with your approval in all respects? A. Yes.

Q. There has been some reference to a Mr. Roger Passarella. He is your son-in-law? A. Yes.

Q. By training he is what? A. An accountant.

Q. He is in your employ? A. No, sir.

Q. He is independent, he works for another agency? A. He has his own business.

Q. He is active in the business in some respect to you? A. Yes.

Q. You heard your brother, Patrick? A. Yes.

Q. You know what is bothering him? A. Yes.

Q. You are going to make sure that is taken care of? A. Yes.

Q. I got the feeling he has been in the middle of this thing somehow. A. He has.

[24] Q. Let's not keep him there. He doesn't belong there. Obviously, all he ever wants to do is his work; is that right? A. That's right.

Q. Let's keep him happy. A. (No response).

THE COURT: All right, Mr. Manzo, you may step down.

(Witness executed.)

MR. JOURNICK: May we submit the order?

THE COURT: You may.

Let the record indicate that the Court has executed the original and nine copies of this agreement. First, let me take this opportunity to extend my sincere appreciation to counsel. There were times when I thought they were going to drive me crazy. When I used to hear from my secretary they were on the phone I wanted a place to run and hide. I want to make a sincere declaration of the Court's gratitude toward both of you and Mr. Becker, and Mr. Post, of course, has been in this alone. Maybe he goes back to the office and finds solace. He has not had anybody to talk to. I do want to extend the Court's appreciation to you in a meaningful sense. I [25] appreciate the effort you had. I don't care what your clients think. I know what I think.

I want to express to the litigants that this has been a very difficult case for the Court and for counsel, not because of the issues involved, but because of the personalities. You see, it is a very difficult thing. If you were three guys who didn't know each other and had been partners, it would have been a different story. But you are brothers. Someplace along the line you forgot who you were. You forget working together all these years has brought prosperity to you. Unfortunately, you had a falling out. It may have been with reason or without reason, but, after all is said and done, in all the world you are still brothers. I don't know if you are going to sit down one night for dinner and let bygones be bygones. Maybe that can never happen. Maybe you can never put the cake back together after you cut it.

Appendix C

It is going to take some time to carry out the terms of this settlement. If you have never believed in each other, if you have never had faith in each other — and maybe you did.

[26] Maybe it was blind faith at one time, then it got to be un-blind, and that is what caused this problem. I don't know, and I don't really care. My purpose in speaking to you at this time is to try and impress you with the importance of resolving and carrying out the terms of this resolution in a civilized manner; and I did not forget you are brothers; you forgot you are brothers. I tried to keep reminding you that you are brothers, but you forgot that. I didn't.

I would expect that in the spirit, not as brothers, but as grown men, each of you will go forth from this courtroom today with the understanding that it is going to take cooperation and understanding.

Now, there is a lot of money involved in this, there's a terrible lot of money. Figures got thrown around here like little toy balls on the beachfront, figures that I can't comprehend myself as far as personal wealth is concerned. They did not get put together through stupidity, greed, animosity or antagonism. That was obviously a joint effort, with a lot of work, a lot of brains, a lot of cooperation.

[27] All I ask you to do is — I don't care if you ever talk to each other. I think it is still wrong to behave that way as brothers. That's your own personalities. What I want to impress on you is it is going to take the continued kind of cooperation that put this thing together to properly carry it out. Stop fighting, get back to business, stop looking over your shoulder. Don't worry about what the other guy is doing.

Appendix C

If there are problems in the future, this Court will settle those, they will be carried out according to the terms of the agreement. Each one of you has got to answer to me if you do anything wrong, and I don't like people who mistreat other people, and I don't like brothers who mistreat other brothers. After all, it is a God-given thing. It is not something you go out and incorporate, like a corporation. You can't get a brother like a stockholder.

Now, I don't know how soon the attorneys can act on the provisions of this, but it is still going to take continued cooperation. You still have businesses which are inter-dependent. As I understand it, if Manzo Excavating still [28] needs asphalt — is that right?

MR. POST: Manzo Contracting.

THE COURT: I'm sorry. Continue like it was, cooperate, keep everything open and above board. You have enough in your personal pockets that you don't have to bother these businesses, leave them alone, because if I find anybody fooling around I will act swiftly, and I am no respector of persons. The way I see it, the right way, the wrong way, is the way I am going to call it. I will act quickly and fast, with sure action. Let's get this thing going. Obviously, everybody wants to get it whacked out. If that is so, let's get going as fast as we can. Act like gentlemen. If you can't act like brothers, act like gentlemen, and let's bring this to a happy conclusion. At least, if you are not going to put your arms around each other, kiss and make up, okay, let's do the next best thing. Just treat each other with dignity and respect and respect the rights of individuals, because they have not been thus far, and they are now part of the judgment of this Court. I leave you with that message.

Appendix C

Again, I want to thank the attorneys.

[29] This Court is now in recess until nine o'clock Monday morning.

CERTIFICATE

Certified a true transcript of my stenographic notes.

s/ DANIEL GREENSPAN,
C.S.R.,
Official Court Reporter

APPENDIX D — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED FEBRUARY 26, 1990

31,282

PATRICK MANZO, et al.,

Plaintiffs-Appellants,

vs.

MICHAEL MANZO,

Defendant-Respondent,

and

ROSE MANZO, et al.,

Defendants.

and

MICHAEL MANZO, et al.,

Third Party Plaintiffs,

vs.

OLD BRIDGE LAND DEVELOPMENT CO., INC., etc., et al.,

Third Party Defendants.

ORDER

Appendix D

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of February, 1990.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Stephen Townsend
CLERK OF THE SUPREME
COURT OF NEW JERSEY

APPENDIX E — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED MAY 1, 1990

31,282

PATRICK MANZO, et al.,

Plaintiffs-Movants,

vs.

MICHAEL MANZO,

Defendant-Respondent,

vs.

ROSE MANZO, et al.,

Defendants.

and

MICHAEL MANZO, et al.,

Third Party Plaintiffs,

vs.

OLD BRIDGE LAND DEVELOPMENT CO., INC.,

Third Party Defendants.

ORDER

Appendix E

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 1st day of May, 1990.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Stephen Townsend
CLERK OF THE SUPREME
COURT OF NEW JERSEY

Supreme Court, U.S.
FILED
AUG 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-62

In The

Supreme Court of the United States

October Term, 1990

JOSEPH MANZO and PATRICK MANZO, et al.,

Petitioners,

vs.

MICHAEL MANZO, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIOARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED

1. Whether improper conduct in 1981 by a trial judge, acting by agreement of the parties as an arbitrator in the implementation of a Settlement Stipulation entered into in 1976, constitutes a violation of due process which requires vacating all prior orders of that judge in that matter, where the party seeking such relief actively solicited the improper conduct and where that party has been unable to demonstrate any prejudice by that judge prior to his recusal.

LIST OF PARTIES

While petitioners correctly list the parties to the proceeding below, they incorrectly spell Clare Passarella's name. In addition, whereas Petitioners describe all of the corporations as closely held corporations owned by the Manzo brothers, as a result of the lower court's orders, Joseph and Patrick Manzo no longer have any interest in Manzo Contracting Co., Inc., Old Bridge Land Development Co., Inc., Northeastern Land Development Co., Inc., Marlboro Bar & Liquors, Inc., Manzo Excavating Company, Inc., and Madison Bituminous Products, Inc.

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JURISDICTION

This Court lacks or should not exercise its jurisdiction under 28 U.S.C. §1257(a) to review the judgment of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), or of the New Jersey Supreme Court in denying a request for certification and dismissing the appeal as of right, *see* Pet. 63a, because those decisions were based on adequate non-federal grounds. Those grounds include the fact that the final decisions of the eventual trial court judge, in his role as arbitrator by agreement of the parties, were non-appealable, and the fact that whatever objections Petitioners may have had based on alleged "prejudice" of Judge Yaccarino before he recused himself, were waived under applicable state law by Petitioners' failure to raise those objections in a timely manner. *See* Pet. 11a.

STATEMENT OF THE CASE

In 1976, petitioners, Patrick Manzo and Joseph Manzo, settled the law suit they had filed against their brother, Michael Manzo, involving seven family held corporations and business. That Settlement Stipulation recognized that certain further actions would be required to fully implement its terms. In recognition of the need to put an end to the disputes that had led to the litigation, the Stipulation provided that the Monmouth County Chancery Judge would serve as arbitrator in interpreting and implementing the terms of the Settlement, and expressly provided that the judge's decisions in that capacity would not be appealable. Pet. 4a-5a. Despite that

clear provision, Patrick and Joseph appealed numerous decisions of the Chancery Judge, only to be explicitly told by the Appellate Division on two separate occasions that the non-appealability provision of the Settlement Stipulation would be enforced. *See* Pet. 5a-6a.

For several years after the actual settlement, Judge Yaccarino, as the Chancery Judge, made various rulings interpreting and implementing the Settlement Stipulation. Those rulings included affirmation of the appraisals of numerous corporate assets and of the selection of assets made by Michael pursuant to the terms of the Settlement Stipulation. Apparently dissatisfied with the manner in which those rulings were being made, and having had Judge Yaccarino and the Appellate Division deny his request to set aside the entire Settlement Stipulation, Joseph Manzo in 1981 embarked on a course of improper dealings with Judge Yaccarino with the specific intent of having the Judge removed from the case. *See Matter of Yaccarino*, 101 N.J. 342, 378, 502 A.2d 3, 22 (1985). *See also Matter of Yaccarino*, 117 N.J. 175, 564 A.2d 1184 (1989) (disbarment). Those efforts succeeded, for in March 1982, Judge Yaccarino recused himself voluntarily from the case.

In May, 1982, Petitioners filed a motion "for relief to litigant" in which they sought eight forms of relief. One item of relief requested was an order "setting aside the Settlement Stipulation and order dated July 9, 1976 and requiring that the parties to this action negotiate a new agreement . . . " Pet. 7a. On May 13, 1982, apparently in connection with the motion, Patrick Manzo filed a certification which asserted that to avoid "impending tax disaster, the stipulation of settlement must be set

aside. . . . " Pet. 7a. That certification did *not* assert that a reason for setting aside the Settlement Stipulation was Judge Yaccarino's conduct, which by that time was well known to both Petitioners and the general public. *See Yaccarino*, 101 N.J. at 378, 383, 503 A.2d at 22, 24. That motion resulted in an order executed by Judge McGann, who succeeded Judge Yaccarino, reflecting that Petitioners' request to set aside the Settlement Stipulation had been voluntarily withdrawn. Pet. 7a.

Despite Joseph's knowing participation in the events which led to Judge Yaccarino's recusal and eventual removal from the bench, and despite not have raised the issue in the 1982 motion to vacate, in late 1986 Joseph shamelessly sought to benefit from his own improper behavior by moving to have all of Judge Yaccarino's decisions vacated, and to set aside the entire 1976 Settlement Stipulation. Judge McGann denied that motion. Pet. 8a 265. The Judge then appointed Irwin I. Kimmelman as Special Master pursuant to New Jersey Court Rule 4:41 to conduct hearings on the items remaining to implement the Settlement Stipulation. Pet. 8a.

Following the Special Master's hearings, Judge McGann entered a final Order implementing all provisions of the Settlement Stipulation, and Joseph and Patrick once again appealed.

Before the Appellate Division, Petitioners argued that Judge Yaccarino's misconduct in 1981 required setting aside the entire 1976 Settlement Stipulation. The Appellate Division disagreed.

In particular, the Appellate Division rejected Petitioners' contention that "because Judge Yaccarino

breached judicial ethics in connection with their settlement that breach is sufficient, standing alone, to set aside all his decisions in this matter." Pet. 9a. The court concluded that, particularly in the circumstances here, at least some indication of prejudice in the judicial actions taken *prior* to the misconduct must be found in the record in order to justify vacation of such prior actions. Rather than point to specific instances of prejudice, Petitioners asserted before the Appellate Division that they simply had a "pervasive feeling" that Judge Yaccarino was prejudiced against them and that "Michael might have somehow improperly influenced Judge Yaccarino." Pet. 11a. As the Appellate Division recognized,

> although plaintiffs' claim to have had the "pervasive feeling" of prejudice "throughout" the case, they never asserted that as a grounds for setting aside the settlement in either of their two prior appeals, nor did they raise the argument when they moved to set aside the settlement in May 1982, subsequent to Judge Yaccarino's refusal.
>
> [Pet. 11a.]

Against this record, the Appellate Division properly concluded that there was "a lack of substance in [Petitioners'] position on this point." Pet. 11a.

In addition, the Appellate Division quite properly concluded that Judge McGann's final order implementing the settlement was entered in his capacity as the arbitrator under the Settlement Stipulation. As such, his decisions were final and non-appealable unless entered without notice and without affording the parties an opportunity to be heard.

> However, in view of the extensive hearings conducted by the special master, the opportunity given to the parties to file exceptions to his report, and their opportunity to be heard in open court prior to the entry of Judge McGann's decision, it is clear that the due process aspects of the settlement document were faithfully followed.
>
> [Pet. 13a]

The New Jersey Supreme Court denied Petitioners' petition for certification, and dismissed Petitioners' appeal by Order dated February 26, 1990. Pet. 63a. That Court also denied Petitioner's motion for reconsideration by Order dated May 1, 1990.

Contrary to the Petitioners' characterization of the facts, Judge Yaccarino never "solicited a bribe," and nothing in the record of this case or of the New Jersey Supreme Court's decisions involving Judge Yaccarnio's misconduct supports that characterization. In fact, as previously indicated, one of the petitioners, Joseph Manzo, actively sought to induce Judge Yaccarino to act improperly for the purpose of getting the judge removed from the case.

REASONS FOR DENYING THE WRIT

1. THE FACT THAT THE LOWER COURT DECIDED THESE ISSUES ON ADEQUATE NON-FEDERAL GROUNDS REQUIRES THAT THIS COURT NOT EXERCISE ITS JURISDICTION.

In exercising its certiorari authority, this Court has repeatedly adhered to the principle that it will not review

judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1954). In the instant case, two such independent grounds exist. First, in addition to rejecting Petitioners' allegations of a due process violation, the Appellate Division concluded that Judge McGann's final order implementing the settlement was entered in his capacity as arbitrator under the Settlement Stipulation voluntarily entered into by the parties. As such, pursuant to the terms of that Stipulation, his decisions were final and non-appealable unless entered without notice and without affording the parties an opportunity to be heard. Pet. 13a. As that opportunity was clearly provided as to all of the decisions made by Judge McGann, the Appellate Division rested its decision on the adequate non-federal ground that the final order of Judge McGann was non-appealable.

In addition, the Appellate Division concluded that under applicable state law, Petitioners' long delay before asserting that prejudice occurred "throughout" the proceedings, constituted a waiver of such an objection. Specifically, they did not raise such an issue when they moved to set aside the Settlement in May 1982, subsequent to Judge Yaccarino's recusal. *See* Pet. 11a.

2. THE STATE COURT'S DECISION DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW, NOR DOES IT CONFLICT WITH THIS COURT'S DECISION IN *AETNA V. LAVOIE*.

In their argument, Petitioners fail to identify the "important question of federal law" raised by the decision below. Instead Petitioners' reason for granting the

writ is based upon the faulty premise that the record below indicates that Judge Yaccarino sought to solicit a "bribe" and that all of his decisions made *prior* to his improper conduct in 1981 were "suspicious" and "necessarily affected." Nothing in the record or in the two New Jersey Supreme Court decisions involving Judge Yaccarino supports these assertions.

While this case has consumed a substantial amount of judicial time over the past fourteen years, it has never involved issues of general public importance, let alone an important question of federal law. Rather, the case commenced as a shareholder dispute which was resolved by a detailed and complicated settlement stipulation in 1976. Over the next dozen years, the courts and Michael Manzo worked to implement that settlement. That process encountered repeated delays occasioned in large part by Joseph and Patrick appealing numerous decisions which they had agreed would be non-appealable, and by Joseph undertaking a series of actions designed to force Judge Yaccarino to disqualify himself from further involvement in the matter. *See Matter of Yaccarino*, 101 N.J. at 378, 502 A.2d at 22.

Having concluded that the Settlement Stipulation and the decisions implementing it were not to his liking, Joseph set out on a deliberate course to subvert justice by inducing Judge Yaccarino to commit actions requiring his disqualification. Having succeeded in getting rid of one judge whose decisions Joseph did not like, Joseph then urged Judge McGann and, most recently, the Appellate Division, that the entire settlement be set aside on the basis of his success in having compromised Judge Yaccarino.

Judge McGann properly denied the request, observing that to grant it would be "madness," Pet. 37a. The Appellate Division properly affirmed, finding a total lack of factual support for Petitioners' assertions of either general or specific prejudice. For Judge McGann or the Appellate Division to have granted Petitioners the relief they requested would have violated the long standing public policy in New Jersey that a party may not profit from his own wrong. *See, e.g., Jardine Estates v. Koppel*, 24 N.J. 536 541, 133 A.2d 1, 4 (1957).

The simple fact is that Joseph and Patrick Manzo are unhappy with the 1976 settlement and Joseph has been willing to go to any lengths, as evidenced by the Supreme Court decisions in *Yaccarino*, to have the settlement vacated. However, as the Appellate Division properly concluded, the Petitioners' displeasure with that settlement agreement did not provide a basis for setting it aside. Nor does that continuing displeasure provide a basis for this Court granting the writ.

Petitioners' assertion that the Appellate Division's decision in this case is inconsistent with the Court's opinion in *Aetna v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L.Ed. 2d 823 (1986) is also totally unpersuasive. While Rule 10.1(c) provides that a writ of certiorari may be granted "[w]hen a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court," the mere assertion of conflict with Supreme Court precedent will not suffice. "Rule [10] requires that the application of the precedent to the case at bar be clear, and that the state court . . . did not follow that precedent." 13 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶817.45 (2d Ed. 1988). Here, the

state court did acknowledge the precedent enunciated in the *Aetna* case. Pet. 9a. However, the Appellate Division properly concluded that *Aetna* was in no way dispositive of this case.

Aetna is inapplicable to the facts here and did not purport to address in general terms the effects of a *subsequently* arising disqualification on earlier actions of the disqualified judge. In *Aetna* this Court carefully limited its holding in these terms: "We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification." 106 S. Ct. at 1589.

The facts in *Aetna* were complex. Briefly stated, a sitting state supreme court justice casts the deciding vote in a matter that set direct and controlling precedent in two cases in which he was the plaintiff. Those two cases were pending in the lower courts of the same state. As a result of his vote and the supreme court's decision, that justice subsequently obtained a favorable settlement of $30,000 in one of his two actions. On these facts, this Court found that the state justice had a "direct, personal, substantial and pecuniary" interest in the outcome of the matter before the state supreme court at the time he participated in that court's decision. Under those circumstances, the Court concluded that the justice's participation had violated the litigant's due process rights. On those specific facts, the Court held that the justice should have disqualified himself and that his failure to have done so required vacating the state supreme court's decision. As the Court explained, because of the particular state justice's "leading role in the decision under review,

we conclude that the 'appearance of justice' will best be served by vacating the judgment." 106 S.Ct. at 1589.

What *Aetna* did *not* hold was that, in every case in which a judge should have disqualified himself, due process requires that all decisions made by that judge must be vacated or treated as "void." Moreover, this Court obviously did not address the question of what effect events which give rise at a specific point in time to a basis for disqualification have on decisions made by that judge at some time *prior* to those events.

The contrasts between this case and *Aetna* are clear. Firstly, the settlement in this case was a settlement, not a judicial decision by a judge who stood to benefit directly by that decision. It was reached with the full participation and with the understanding of all parties and their counsel as shown from the transcript which placed the settlement on the record. Secondly, the act of the judge which is cited as the basis for the request to vacate the Manzo settlement occurred, not while the settlement was pending, but in fact years after it had been agreed upon and substantially implemented. Indeed, the very property involved, the house in Sea Girt, had already been distributed to Joseph and Patrick.

Thus the facts amply support the conclusion that this decision reached by the Appellate Division in the case at bar is simply not inconsistent with *Aetna* or with any other decisions of this Court.

CONCLUSION

For the reasons set forth above, the requested writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 1, 1990